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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DELBERT LESLIE MILLER, Defendant and Appellant.	A121646 (Humboldt County Super. Ct. No. CR052015BS)

Following conviction by a jury of first degree murder with sustained allegations that appellant Delbert Leslie Miller personally used a knife during commission of the murder, plus trial court findings that he had prior serious felony convictions and two prior "strike" convictions,[1] the trial court denied appellant's motions to dismiss and for a new trial. Thereafter the court sentenced him to 81 years to life. Appellant challenges the conduct of the prosecutor and the competency of his attorney. We affirm.

I. FACTS

A. *Discovery of Lorie Jones's Body*

On September 28, 2004, Humboldt County Sheriff's Department personnel met near Grizzly Creek State Park in a wooded area just off Highway 36 that was close to a trail and access road. The location was about 17 miles from the intersection of Highways 36 and 101 at Alton; it was "fairly rugged country." There they came to the fully clothed, dead body of Lorie Jones. There were cuts and tears on her jacket consistent with blades,

[1] The prior convictions were for forcible oral copulation and forcible rape.

and signs of decomposition, including maggot activity and mummified skin. As well, an evidence technician found what she thought was ridge detail from a patent fingerprint in a blood medium on the back of one of Jones's shoes. However, there was insufficient ridge detail for comparison.

Two days later Dr. Susan Comfort performed an autopsy. She estimated Jones had been dead for a minimum of three weeks, probably four weeks or more. The body was "very decomposed" and infested with maggots. Dr. Comfort determined that Jones's body length was five feet six inches, and estimated she weighed between 120 and 130 pounds.

Dr. Comfort opined that the cause of death was multiple stab and incised wounds. She was able to clearly identify 25 stab wounds and nine incised wounds. There were wounds on the left breast, chest, abdomen, back, right wrist, left forearm, left hand, right shoulder, right clavicle, neck and head.

The five stab wounds on Jones's left hand were "classic defensive wounds." Three of the wounds on her back perforated the rib cage and punctured her lungs; these were potentially lethal. There was also a significant incised wound below Jones's right ear that severed her common carotid artery and was also potentially lethal. Additionally, there were nine more wounds on the neck and five fairly short wounds on the head.

Dr. Comfort could not determine whether any particular wound was inflicted postmortem or whether one or more stabbing instrument was used, but the shorter wounds on the neck made her wonder "if maybe there was two different knives that were used." It was also impossible to determine the sequence of the injuries inflicted on Jones.

Nothing relevant came of the sheriff's department's subsequent searches of the site where Jones's body was found and the surrounding area, for weapons, blood and other evidence.

B. *May 2005: The Investigation Focuses on Appellant*

Commencing in May 2005, the investigation began focusing on appellant. A series of four interrogations took place between May 2 and May 5, detailed below. He was nearly 62 at the time of the interviews, and had undergone heart bypass surgery.

These interrogations were audio and/or videotaped and, with the exception of one redaction, the recordings were played in full for the jury.

1. *May 2, 2005, 11:10 a.m. to 1:40 p.m.*

Humboldt County Sheriff's Detectives Rich Schlesiger and Mike Campbell were assigned to the Jones investigation. On May 2, 2005, around 11:10 a.m., they contacted appellant on the street and asked him if he would speak with them about Jones. Appellant agreed and got into their unmarked police vehicle; the officers did not pat appellant down or handcuff him. Asked if he wanted to talk at his residence, appellant indicated that would be fine but when they arrived, he asked to speak outside because his house was a mess. The taped interview began in the vehicle. Simultaneously, at sheriff's headquarters, Detectives Tom Cooke and Steve Quenell were interviewing appellant's housemate, Steve Comarsh.

Appellant had known Jones "for years"; they had a "[p]retty damn good" relationship. She had "drug problems," but only brought "it around" appellant one time. Appellant knew Jones was a prostitute, wanted to sleep with her but never did, although they came close many times. Nor did Comarsh have sex with Jones, although he too had come close. Comarsh and Jones "got along all right." Jones came to the apartment "all the time" to take showers; she was "mainly homeless."

When told that Comarsh had been telling folks that he (Comarsh) killed Jones, appellant registered doubt, stating Comarsh did not have "a mean bone in his body." He had no idea why Comarsh would make such statements. Schlesiger expanded, intimating that Comarsh also said appellant was there and helped get rid of the body. Appellant denied the accusation. The detective told appellant he did not care if appellant helped dispose of the body, he only wanted to know who killed Jones.

Appellant did not "have any idea" who killed Jones. Appellant heard Jones "had her throat cut and they slashed her tits off and left a crow bar up her ass." Neither he nor Comarsh had been with Jones to the location where her body was found. Appellant had gone camping there a long time ago.

Schlesiger brought up the rumors that Jones had accused him of raping her. Appellant dismissed the accusation as "bullshit." About a month before Jones "wound up dead," she went to bed loaded and when she woke up "wet and sloppy," asked "did we do it?" She also asked Comarsh if she "did" "it" with either one of them. Appellant had fondled her that night, but she was "out of it." Appellant did not confront Jones; he "just let it go"; it "[w]asn't nothing." He knew he did not "do it" and Jones kept coming over to take showers. But he also acknowledged that he was upset about what she said about him. Comarsh was concerned that appellant would get in trouble because of the allegations and told appellant he "shouldn't let her come around." Appellant admitted that he did 10 years for "an old rape," but claimed the sex was consensual. He also had convictions for armed robbery, car theft and burglary.

Schlesiger showed appellant Jones's shoe, with a fingerprint "made in her blood." The detective repeatedly said it was appellant's fingerprint (not true); appellant consistently denied it was his and did not know whose it could be and repeatedly denied killing Jones; nor did he help dispose of the body or witness what happened. Appellant accused the police of lying about the fingerprint to see if he would "tell on (Steve)" and reiterated that he did not think Comarsh "did it." He gave the police permission to search his vans and his home.

Detective Schlesiger asked appellant why he was crying; appellant responded he was sweating (the detective rolled down the window). Appellant also said he wanted to eat, but the interrogation continued until appellant repeated he wanted to eat before he got sick. Food was procured. Appellant also repeated that he liked Jones "a lot" but "she wasn't ready for a relationship"; she had "a husband and kids somewhere." He acknowledged Jones had ripped him off.

Appellant ate and the detective continued to probe about what happened to Jones. Appellant did not take the bait and continued to deny any knowledge beyond neighborhood gossip.

Schlesiger made a phone call then reported to appellant that Comarsh was "spilling his guts," and asked appellant if he stabbed Jones ("No") or if Comarsh did ("I

don't know"). Nor did he appellant know where she died—not at his apartment and he was not present when Comarsh buried her. Schlesiger related that Comarsh said, "[Y]ou were there when . . . you guys buried her." Appellant continued to deny involvement or knowledge. Additionally, he signed consent to search forms.

After more than two hours of questioning and following a lighter conversation about motorcycles and "weed," Detective Schlesiger circled back to the disposal of Jones's body and asked if appellant was worried about helping Comarsh dump the body. Appellant replied, "Well, wouldn't you be?" and then said all he did was help Comarsh dispose of her. Comarsh just showed up, announced "done" and said he wanted help to "get rid of her." He was drunk. They retrieved the body near the library, wrapped it in a sheet and drove to a location Comarsh knew about. Appellant agreed to help because Comarsh was trying to protect him from Jones—she was using him, having ripped off appellant and bragged about it.

The men carried Jones's body about a half mile, tried to dig a hole to bury her but gave up because the ground was too hard. On the way back to town they threw the shovel and sheet out of the window. Back home appellant threw his clothes away and cleaned up the van. Appellant denied participating in the killing. He did not come forward because he was too scared and did not want to get into trouble for dumping Jones, whom he loved.

Detective Schlesiger arrested appellant for accessory to murder and transported him to the criminal investigation unit of the sheriff's office.

2. *Interrogation at Sheriff's Office*

Later in the afternoon on May 2, 2005, Detectives Schlesiger and Cooke interrogated appellant at the sheriff's office after he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). Initially appellant reiterated his earlier statement about disposing of the body. He maintained he did not stab Jones—she was already dead "by the time I found out about it"—notwithstanding that the detectives represented that Comarsh said appellant stabbed her. He did not know where Jones was stabbed—definitely not in the apartment—or why she was killed. Appellant guessed Comarsh was

trying to protect him; the rape allegation was "nothing." But then he said "[w]ell sure," he would be worried if Jones were telling people she was drugged and raped in his apartment. Comarsh was trying to protect him from "an allegation like that" or "ripping me off all the time."

The detectives challenged appellant's account. Schlesiger maintained appellant drove Jones and Comarsh "out to thirty six." Appellant admitted to this, but did not know Comarsh was going to kill her. Comarsh had told Jones they were going to "meet somebody out there and get some drugs," and indicated that appellant could buy a pound of marijuana. Once out of the car and on the trail, appellant was behind them, some 50 to 75 feet down the hill. He heard Jones hollering when she and Comarsh "went down off the trail."

Appellant insisted he did not stab Jones and did not "see anything"; he "[j]ust heard it." Comarsh started to dig a hole. They both covered Jones with dirt and brush. On the return trip appellant told Comarsh to throw out everything—the knife, shovel, plastic. He guessed Comarsh threw the knife out the window. The plastic was in the car "[i]n case we needed it" "[t]o wrap her in." They threw things out "in case she touched anything."

Appellant repeated that he was not worried about the rape allegation because he did not do it. All he did was try unsuccessfully to turn her on. Comarsh wanted to "do this," he guessed, to protect appellant from Jones stealing his expensive carving tools. The detectives insisted that appellant knew what was going on when they went to the woods, and poked holes in his narrative. Appellant continued to deny knowledge of or involvement in the killing. The detectives represented there were two knives, and said they retrieved appellant's clothing from a dumpster. He insisted he did not kill Jones.

Near the end of the interview appellant agreed to give a blood sample.

3. *May 3, 2005 Interrogation*

Detectives Cooke and Quenell interrogated appellant on the afternoon of May 3, 2005.[2] The detectives indicated they were focusing just on appellant's involvement, not that of Comarsh. Appellant more or less repeated what he had said toward the end of the second May 2 interview about the trip to the woods. Further, although Comarsh had indicated they were supposed to meet somebody, once they "got up there" Comarsh's story changed; he said maybe they were late, and the seller had buried the drugs.

Directing appellant to look at him while denying that he stabbed Jones, Quenell communicated that "it's time the truth be known Les, enough is enough," and advised that he "face up to it like a man." Appellant related that "[s]he was crying and shit, I felt so sorry for her and I couldn't handle her crying like that, just couldn't. [¶] . . . [¶] . . . I don't know, I can't even stand an animal when it's fucking getting killed, and it's a bad kill man, I can't, this dull crying and shit, never could." To put her out of her misery he cut her twice in the neck. Appellant explained: "That's why I stayed up on the hill because I didn't want to go down there. I didn't want no part in none of that shit, could see what was going on by then, you know if we gonna meet somebody, they should have been there right by the fucking rig, you know. Just one (1) lie after another, after another lie, . . . and it never quits."

Comarsh was carrying a "longer than . . . normal knife." Appellant had a reconditioned, excessively thick "Buck" knife. He declared that he "didn't plan none of this shit man I kind of feel like I was taken advantage of a little bit, like a stupid fucking fool, I didn't run away." On the drive back appellant "chew[ed] his ass. So stupid, didn't have to go this far, why?" Comarsh said "it had to be."

Appellant insisted that he only knew about the marijuana deal, and later Comarsh told him "he [Comarsh] promised her some heavy drugs, to go along with my deal." He

[2] The videotaped interview was played for the jury. A partial transcript was provided; a transcript covering the last five minutes has been prepared for this appeal pursuant to a settled statement.

continued to deny ever having sex with Jones. Appellant divulged that when he saw "[s]omething was hanging out of her[,] man, scared the shit out of me."

4. *May 5, 2005 Interrogation*

Detectives Cooke and Quenell again interrogated appellant on the morning of May 5, 2005. They discussed items Jones had stolen from appellant—a motorcycle jacket, tools and knives. The officers asked about prior killings by Comarsh. Appellant did not think Comarsh was being truthful that he had killed others.

Appellant "guessed" they killed Jones in early fall 2004. He never killed anyone before.

5. *Followup Investigations*

Meticulous searches of appellant's residence, van and pickup revealed nothing incriminating; nor did further searches of the Highway 36/Grizzly Creek area.

C. *Defense Case*

Dr. David Ploss stated that he performed a cardiac catheterization on appellant in 2002 and subsequently, a cardiac surgeon performed bypass surgery. As of December 2003 there had been no complications, appellant had been very compliant in taking his blood pressure and cholesterol medications, and was walking on a regular basis.

Judy Long, Jones's best friend and a fellow prostitute, last saw Jones the year she died. Jones asked Long to hold $400 for her, saying she would be back in a few hours. Jones got into a green "dually" truck with a man Long did not recognize—not Comarsh or appellant. It was not uncommon for Jones to get into a vehicle with a man she did not know. As well, it was common for Jones to disappear for a day or two, but after two days Long became worried because she had Jones's money.

Long lived upstairs from appellant. It was not unusual for Jones to go to his apartment after a date, sometimes to shower.

Two felons also testified about conversations they had with Comarsh, or overheard in which Comarsh was speaking. Danny Baca was in custody at San Quentin State Prison on a parole violation at the same time Comarsh started his sentence for killing Jones. Baca knew Comarsh was from Eureka; Jones was a friend of his and he liked her.

Baca sought out Comarsh, asking him "what happened and why." Comarsh told him that he and a "black man" named Charles lured Jones out to Highway 36 with a promise of drugs. Charles frequented the St. Vincent De Paul free meal program in Eureka. They wanted to teach her a lesson because she was stealing from them and owed money; they did not mean to hurt her "that bad," but things got out of hand and she ended up dying. Comarsh never mentioned appellant.

Wade Bahu had two conversations with Comarsh. The first took place in the bathroom at the county jail. Comarsh was in a stall reading documents and asked Bahu, who was in another stall, what a certain word meant. Comarsh was looking at a motion, which he said was going to get him a new trial. He was trying "to get a deal for 15 years and put it all on Les." Later, Bahu overheard a conversation in which Comarsh told another inmate he was going to "blame this on Les."

D. *Rebuttal*

In rebuttal, the People played for the jury videotapes of the interviews Detectives Cooke and Quenell conducted with Comarsh on May 2 and May 3, 2005. Transcripts were also provided.

1. *May 2, 2005 Interview*

Comarsh was "supposedly homeless" but was staying as a guest at appellant's apartment. He first reported to the detectives that he last saw Jones about a week before he heard she died. She was bragging about a date with three older men who would pay her $1,500 each. Jones had a few enemies because she ripped people off for dope. Comarsh figured that one of her customers killed her because of a rip-off.

Comarsh denied ever having sex with Jones. She used to come to the apartment to take a shower and asked for food. He acknowledged that Jones "was ripping Les off . . . . That's why Les had her move out." Appellant was "tired of her shit. . . . [T]ired of her ripping him off." The detectives showed Comarsh a photograph of Jones's shoe and maintained (falsely) that it contained his fingerprint in her blood. Comarsh announced, "I might as well cop to it" and proceeded to tell them that a 64- or 65-year-old man "paid me seventy-five bucks, to help move her . . . to Highway 36. It was a white pickup,

dually like I explained. I don't know who he was, I only seen him once." He assumed the man wanted help burying his cat or dog, but it was Jones's body, "sliced up pretty bad." The man told him that Jones had ripped him off for "a whole bunch of money" for dope. He also expressed that the "same thing" would happen to Comarsh if he said anything. Comarsh never told appellant about the incident.

The officers showed Comarsh a picture of Jones with her children. Comarsh acknowledged he had met them. Quenell pressed, "[I]t didn't quite happen the way you're explaining it to us and all's you're doing is making matters worse." At that point Comarsh related a different version, initially revealing that the man's name was Jim, "drives . . . down [t]hird [s]treet," and was going to pay Comarsh several hundred dollars for his help. Comarsh explained that Jones had "ripped . . . a couple of us off." So he and Jim picked her up while she was waiting for a date. They told her they would take her to Bridgeville for a $1,500 date and she could pay Jim back. After driving "out there," the men talked Jones into going "into the trees," telling her there was house up a driveway where they would "get a bunch of dope." With Jones under the impression she was "going to get spun," Jim grabbed her and stabbed her in the neck. When Jones started kicking Comarsh, he stabbed her a couple of times. The men talked her into going up a road, but Jones "wouldn't do the trick and that's when it happened." Jim started it out and stabbed her in the neck. When Jones started kicking Comarsh, he stabbed her a couple of times with a "mini sword" that Jim provided. Appellant was not there.

When asked if there was anything else he wanted to divulge, Comarsh replied: "Okay. Les was involved in it. [¶] . . . [¶] . . . [S]he was ripping him off too." Appellant drove Jim's truck but did not do anything to Jones and had nothing to do with her killing. The plan was to "get Lorie out here to do [the] trick . . . get paid." Appellant rode with Comarsh and Jim "[f]or money." Appellant did not know Jones would be killed. "[H]e knew we wanted her out there for tricks, . . . the money . . . she owed the other guy."

Confronted with an assertion that appellant disclosed that Jones was killed behind the library, was wrapped in a sheet and "it was just you and him, there was no Jim," Comarsh admitted, "Okay, it was just him and I." But there was no sheet or library; it

happened on Highway 36. They were fed up "[h]ardcore" with her ripping them off. They planned the killing the night before. Then he said appellant "first mentioned" "let's kill Lorie cause she ripped us off." Comarsh thought he was joking. They drove Jones out to Highway 36 "the first night" with a story of buying drugs, but did not follow through and led Jones to believe the seller failed to show up. They returned the next night on the same false premise; "Les starts stabbing her in the neck and I stabbed her in the stomach a few times." Appellant had the little knife; Comarsh had the sword. Elaborating, Comarsh indicated appellant grabbed Jones by the hair and started stabbing. Comarsh grabbed Jones's foot as she started kicking him; when she went down, they both stabbed her.

2. *May 3, 2005 Interview*

The following day Comarsh continued to assert that he and appellant killed Jones and reiterated much of his final story of May 2. Comarsh repeated that it was appellant's idea, and still thought appellant was joking until he started stabbing Jones. Apparently appellant wanted to kill her because "she's trying to fix him to go to prison anyway and I don't know what . . . that was about." He knew appellant had been in prison for close to 10 years, but appellant did not reveal "what for."

On the May 3 recounting, Comarsh related that by the time Jones started kicking, she was on the ground and it "was pretty much over with." Appellant stabbed her several times when she was on the ground.

Comarsh heard about Jones's rape allegations against appellant from three prostitutes. One said she wanted to "kick [Jones's] ass" "[f]or making allegations like that."

E. *Jury Arguments*

In his closing argument, the prosecutor took the position that the evidence was "overwhelming, beyond any reasonable doubt," that appellant was guilty of murder, and the only question was "what level of murder he is guilty of." If the jury believed appellant's account, that while Comarsh stabbed Jones, he, appellant, decided to cut her throat to put her out of her misery, then the verdict should be second degree murder. But,

if the jury found that the murder was planned and appellant actively participated from the beginning, it would be first degree murder.

Defense counsel emphasized that there was no physical evidence connecting appellant to the murder and argued appellant was not present at the murder. He proposed that Comarsh murdered Jones with another person, pursuant to one of Comarsh's version of events as well as Danny Baca's testimony. Further, he contended that appellant's confession was the result of being worn down by relentless police interrogation and bombardment with leading questions and suggestions of details, notwithstanding that appellant had a heart condition, was nauseous from taking medications and not eating, and the food he eventually was given was greasy and upset his stomach.

II. DISCUSSION

A. *Prosecutorial Misconduct: Reasonable Doubt Formulation*

Appellant challenges the trial court's failure to rein in the prosecutor by allowing him to tell the jury, in voir dire and closing argument, and with no admonishment to the jury, "that the decision as to whether guilt had been proven beyond a reasonable doubt was akin to decisions the jurors made in their daily lives, such as deciding to travel in a car or to take an airplane trip or even go to sleep." The relevant text of exchanges during voir dire appears in appendix A, *post*; that of closing arguments in appendix B, *post*.

Following the verdict, appellant moved for a new trial arguing, among other points, that the prosecutor committed prejudicial misconduct in voir dire and closing argument by equating the beyond a reasonable doubt standard of proof with daily life decisions, thereby lowering the People's burden of proof. The prosecutor conceded that he made improper comments regarding the burden of proof, but contended they were harmless. Denying the motion, the trial court impliedly recognized the error but also concluded it was harmless under the standard of prejudice applied in *People v. Prysock* (1982) 127 Cal.App.3d 972, 998, namely it was not reasonably probable that a result more favorable to appellant would have occurred in the absence of the misconduct.[3] The

[3] This is the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

court indicated that it properly instructed the jury on reasonable doubt; properly instructed the jury that if the attorneys' comments on the law conflicted with the instructions, to follow the instructions; and the jury reached a quick verdict based on overwhelming evidence of guilt. On appeal the People acknowledge that because the nature of the misconduct at issue was of federal constitutional magnitude, the standard for evaluating prejudice is that of demonstrating beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 23-24 (*Chapman*); *People v. Woods* (2006) 146 Cal.App.4th 106, 117.)

1. *Factual Background*

a. *Voir Dire*

As reflected in appendix A, *post*, defense counsel questioned prospective juror L.M. about the difference between the beyond a reasonable doubt and more likely than not standards, using the context of making the decision to take a job, in which one would use the latter standard. The next day, referring to, but misunderstanding this exchange, the prosecutor launched into an extensive analogy about how the beyond a reasonable doubt standard comes into play in one's daily life, beginning with the decision to take a job, and proceeding to the decision to drive a car on a given day, or to take an airplane flight. The gist of his analogy is this: You get into the car and drive because you have "decided beyond a reasonable doubt that" you are going to make it, despite awareness of horrific car crashes, the possibility of being hit by "some moron" "blow[ing] through a red light" while talking on a cell phone and the like, even though you are "rollin' down the road at 55 miles an hour" in a "two-ton hunk of metal." This decision to drive, he asserted, was a life and death decision. The prospective juror agreed, and said the analogy was "a great angle to look at it."

A bit later the prosecutor asked prospective juror K.B. if she understood the distinction between proving something beyond a reasonable doubt versus beyond all doubt. The prospective juror replied she had been thinking about driving home on the bluffs—a reference to the prosecutor's driving analogy—and indicated that it was a good analogy.

Questioning another prospective juror about the matter, defense counsel related that this was one area where he and the prosecutor disagreed. Delving into the matter in an attempt to establish that the beyond a reasonable doubt standard has nothing to do with making daily life decisions, the prosecutor successfully objected on two occasions that defense counsel was making an argument.

Shortly thereafter counsel and the court discussed these issues in chambers. Defense counsel argued that the prosecutor was minimizing the beyond a reasonable doubt standard by analogizing the process of rendering a verdict to everyday decisionmaking. The court stated that it believed the prosecutor was doing exactly what defense counsel had done when questioning prospective juror L.M., and it did not find fault with the questioning of either counsel.

Back in open court defense counsel asked another prospective juror, C.G., if he were willing to listen to instructions on reasonable doubt; he said he was.

b. *Closing Arguments*

In his closing argument, defense counsel reminded the jury about the previous discussion of reasonable doubt during voir dire, and exhorted the jury not to lower the standard "just because you think it is as easy as getting into your car and driving." The prosecutor objected to defense counsel's statement that "reasonable doubt basically says that when you decide you are going to vote guilty it is because there is nothing in [the] case that bothers you." The court told the jurors that it had defined reasonable doubt and that was the definition they should apply. Defense counsel clarified his statement and continued to explain how the reasonable doubt standard would work in deliberations.

In rebuttal, the prosecutor reiterated that reasonable doubt "is a standard you use in your daily lives. You make life and death decisions whether you think about it in these terms or not." Defense counsel lodged a continuing objection. The court responded that "both counsel have used analogies from life to try to assist the jurors in understanding reasonable doubt, and I don't see anything different in what Mr. Cardoza is doing than what you did, so I will over[rule] the objection."

The prosecutor continued at length to reinforce his theme. For example, he argued: " You know people get killed in cars every day, but you make the decision to drive. You are making a decision beyond a reasonable doubt . . . about your life." And further: "How is that any greater burden than the decision you make when you get in a car and drive or particularly when you get on an airplane and you have to go somewhere. . . . You go ahead and make that decision to take the plane flight anyway. How is that any less of a—just think about that. Are we asking you to do something you don't do every day? Are we asking you to apply a standard that is higher than what you make in your life and death decisions every day? No."

2. *Legal Background*

Early in California's criminal jurisprudence, our state's high court emphasized that the decision to convict a defendant of a criminal offense differs from what would prompt a decision in the important affairs of life. Thus it was reversible error to tell the jurors it was their duty to convict if they were " 'satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the important affairs of life.' " (*People v. Brannon* (1873) 47 Cal. 96, 97.) The court reasoned: "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. . . . But in the decision of a criminal case involving life or liberty, something further is required. . . . There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused." (*Ibid*.) *People v. Ah Sing* (1876) 51 Cal. 372, 374, held that it was "certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such 'that *a man of prudence would act upon it in his own affairs of the greatest importance*.' [¶] 'Men frequently act in their own grave and important concerns . . . without a firm conviction that the conclusion upon which they proceed to act is correct; but having deliberately weighed all the facts and circumstances known to them, they form a conclusion upon which they proceed to act, although they may not be fully convinced of its correctness. But this degree of certainty is wholly insufficient to

authorize a verdict of guilty in a criminal case. In such a case the jury should be fully convinced of the correctness of their conclusion that the prisoner was guilty, and that conviction should be so clear and strong as to exclude from their minds all reasonable doubt that their conclusion was correct. [Citation.]' "

More recently, an appellate court addressed the issue of prosecutorial misconduct in misstating the standard of reasonable doubt. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35 (*Nguyen*).) There, the prosecutor stated in closing argument that the standard of reasonable doubt is "a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving. If you have reasonable doubt that you're going to get in a car accident, you don't change lanes. [¶] So it's a standard that you apply in your life." (*Ibid.*)

The reviewing court agreed with the defendant that the prosecutor's argument trivialized the reasonable doubt standard by equating it with the same standard people use when deciding to change lanes. "It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt . . . ." (*Nguyen*, *supra*, 40 CalApp.4th at p. 36.) Thus, the court strongly disapproved of the arguments suggesting that the reasonable doubt standard is employed in daily life to decide questions such as whether to change lanes or marry. And it concluded such argument was improper even when the prosecutor, as was the case, said the standard for reasonable doubt was " 'very high' " and told the jury to read the instructions. But, because the defendant did not object to the prosecutor's argument, which objection surely would have been sustained and followed with proper admonition thereby curing the error, the issue was waived. (*Ibid.*) Moreover, the court concluded the defendant was not prejudiced because the prosecutor did direct the jury to read the appropriate instruction and the court correctly instructed the jury on the standard. Referring to the presumption that the jury would follow the instruction, the error was rendered harmless. (*Id*. at pp. 36-37.)

The recent case of *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 presents an interesting variation on a prosecutor's misrepresentation of the reasonable doubt standard. Over defense objection, the prosecutor was permitted to illustrate the standard with a PowerPoint presentation displaying six of eight puzzle pieces of a picture coming on screen sequentially that was immediately recognizable as the Statute of Liberty. The prosecutor argued that " '[w]e know [what] this picture is beyond a reasonable doubt' " (*id*. at p. 1265) notwithstanding the two missing pieces. The puzzle illustration left the jury with the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence, inviting the jury to guess or jump to a conclusion. Further, it inappropriately suggested a quantitative measure of reasonable doubt, namely 75 percent. (*Id*. at pp. 1267-1268.) This misconduct, however, was not prejudicial, "even under a standard of beyond a reasonable doubt." (*Id*. at p. 1269.) After defense counsel maintained during argument to the jury that the prosecutor's display did not represent reasonable doubt, the court said it would clarify the issue and proceeded to read the correct definition. "Under these circumstances, the jury was alerted to the dispute regarding the presentation and impliedly told by the trial court to rely on the jury instruction." Further, it was not a close case. (*Id.* at pp. 1268-1269.)

Reviewing courts have reached a different result where the trial court itself denigrates the reasonable doubt standard. One court, during voir dire, amplified at length on the standard reasonable doubt instruction, equating the requisite proof to everyday decisionmaking, and authorizing jurors to find the defendant guilty if they had some doubt about his guilt. (*People v. Johnson* (2004) 119 Cal.App.4th 976, 979-980, 983.) Taking his cue from the court's instruction, the prosecutor, in argument to the jury, characterized a juror who could find the defendant guilty without some doubt as brain dead, and likened proof beyond a reasonable doubt to everyday decisionmaking. (*Ibid*.) The court's tinkering with the correct formulation of reasonable doubt lowered the People's burden of proof and constituted structural error resulting in violation of the defendant's due process rights. (*Id.* at pp. 985-986.) Reversible error was also called for where the trial court amplified on reasonable doubt by explaining that people plan their

lives around the prospect of being alive and thus take vacations and get on airplanes with belief beyond a reasonable doubt that they will survive. (*People v. Johnson* (2004) 115 Cal.App.4th 1169, 1171-1172.) This amplification amounted to reducing the prosecution's burden to a preponderance of the evidence, mandating reversal. (*Id.* at p. 1172.)

3. *Analysis*

Without question the prosecutor's arguments about, and amplifications of, the reasonable doubt standard were legally wrong, improper and merit strong condemnation. And, the prosecutor's "excuse" for his misstatements—"ignorance of the applicable case law"—borders on the inexcusable. Our job now is to assess the prejudicial effect of the misconduct.

First, as in *Nguyen*, the trial court twice correctly instructed the jury on the correct definition of reasonable doubt—prior to presentation of the evidence and prior to closing arguments. Further, the court also correctly told the jurors to follow its instructions on the law, and if a juror believed counsel's comments conflicted with the instructions, to follow the court's instructions. As well, the jurors were told that they were to decide the facts only on the basis of the evidence presented, and that counsel's arguments and remarks were not evidence.

Appellant suggests that *People v. Johnson, supra,* 115 Cal.App.4th at page 1172 criticized the *Nguyen* court's conclusion that proper instructions can aid in rendering harmless a prosecutor's misstatements about reasonable doubt correct instructions. What *Johnson* criticized was the *Nguyen* court's decision that the defendant *forfeited* his claim of error by failing to object, not its harmless error analysis. (*People v. Johnson, supra,* at p. 1172.)

Second, several other comments during voir dire and summation somewhat mitigated the effect of the misstatements. For example at one point during voir dire, the prosecutor clarified that he used the car example "as an example of how the concept comes into play in our daily [lives]. I'm not saying that that's the way you would apply the concept to the facts in this case . . . ." And the court, after the prosecutor objected to

defense counsel's iteration of the reasonable doubt standard, addressed the jury: "Ladies and gentlemen, I have given you the definition of reasonable doubt so that is the definition you should apply." Additionally, when defense counsel in turn objected to the prosecutor's reasonable doubt analogy, although the court overruled the objection, it did state: "[B]oth counsel have used analogies from life to try to assist the jurors in understanding reasonable doubt, and I don't see anything different in what [the prosecutor] is doing than what you did." Moreover, at the conclusion of his argument, the prosecutor said: "The law is what it is. You will see the instruction. See what it means to you. . . . Reasonable doubt is when you compare and consider all of the evidence, and you make your decision based on that comparison and consideration. If you have a reasonable doubt, you find him not guilty. But if you don't have a reasonable doubt, convict him."

Third, we are mindful that "arguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.' [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703.) Armed with the correct definition of reasonable doubt and the mandate to rely on the instructions, not argument, we presume the jury understood that they were to have an "abiding conviction" that the charge was true.

Fourth, appellant's assertions to the contrary, the first degree murder case against him was exceedingly strong. To begin with, appellant confessed to participating in the stabbing and killing of Jones—specifically, he admitted *stabbing her in the neck twice*. Appellant wisely has not argued that his confession was coerced. As to whether the murder was first or second degree, evidence of premeditation was compelling. Even before appellant confessed to stabbing Smith, he blundered, telling Detective Cooke that he and Comarsh put a piece of plastic he had found in the car, "[i]n case we needed it." When Cooke asked "For what?" appellant replied: "To wrap her in." This of course indicated that the men planned the killing. Additionally, appellant admitted both were

carrying knives and they had a shovel in the truck, more indicia of planning. As well, Comarsh told the police that it was appellant's idea to kill Jones, because she was trying to get him sent back to prison with the rape allegations.

While we do not minimize our disapproval of the prosecutor's misstatements, and of the trial court's failure to sustain defense counsel's objection, on this record we conclude the prosecutor's unchecked misconduct was not prejudicial, even under the standard of beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 23-24; *People v. Katzenberger*, *supra*, 178 Cal.App.4th at p. 1269.)

4. *Appellant's Arguments Are Not Persuasive*

a. *Improper Legal Theory*

Appellant first maintains that the prosecutor's incorrect interpretation of the reasonable doubt standard was ratified by the court when it overruled defense objection during closing argument and explained that both counsel "used analogies from life to try to assist the jurors in understanding reasonable doubt." With this overruling, appellant reasons, the trial court validated an improper legal theory as to the burden of persuasion. (See *People v. Woods*, *supra*, 146 Cal.App.4th at p. 118 [trial court's failure to sustain objections to prosecutor's erroneous argument on burden of proof and other instances of misconduct "effectively informed the jury that the law, facts, inferences and reasoning processes [the prosecutor] urged upon them were valid and acceptable"].)

It is not the case, as appellant urges, that the jury was presented with multiple legal theories, one of which is legally inadequate, thus rendering it impossible to divine whether the jury found defendant guilty on a proper theory. Among other authority, appellant cites *People v. Chun* (2009) 45 Cal.4th 1172. There, the trial court erred in instructing on second degree felony murder because the underlying felony—shooting at an occupied vehicle—was an assaultive crime which merged with the charged homicide and thus could not serve as the basis for a second degree felony-murder instruction. (*Id.* at p. 1178.) A prosecutor's misstatements about reasonable doubt are not presentations of improper legal theories of guilt, as explicated in *Chun*. Through instructional error, the jury was impermissibly permitted to base a second degree murder verdict on the

felony-murder rule. Here there was no conflict in the instructions on reasonable doubt. As we have explained, the trial court correctly charged the jury on reasonable doubt and directed the jury to follow the court's instructions; we presume it did so and did not rely on counsel's interpretation of the law where that interpretation was inconsistent with the instructions. In addition, while the court should not have overruled the defense objection, its comment, quoted above, was general and sufficiently evenhanded—referring to both counsel's arguments to aid the jury in understanding a difficult concept—as to not amount to a stamp of approval of everything the prosecutor said, as was the case in *People v. Woods*, *supra*, 146 Cal.App.4th 106.

On a related note, appellant argues that the trial court's correct instructions do not militate against prejudice because the prosecutor's misstatements were not inherently or obviously in conflict with the correct instructions. We disagree. We think a jury would recognize that everyday decisionmaking does not entail the same solemn process as outlined in CALCRIM No. 220, namely that one begins with the presumption that the defendant is innocent, which presumption in turn requires the People to prove the defendant's guilt beyond a reasonable doubt, as the standard of proof that "leaves you with an abiding conviction that the charge is true." (CALCRIM No. 220 (Aug. 2006 rev.).) Additionally, we are not persuaded that the jury would accept the prosecutor's arguments at face value and ignore the reasonable doubt instruction delivered by the court, particularly in light of the admonition that its instructions prevailed, and defense counsel's urging that the prosecutor's view was not the law.

b. *Contribution to Verdict*

Appellant further posits that the People cannot establish beyond a reasonable doubt that the prosecutor's misstatements did not contribute to the verdict because they were made at two separate stages of the case and never in passing. He emphasizes the length of the prosecutor's discussion during voir dire and summation. Again, the reasonable doubt instruction was twice delivered, correctly, and at one point, in the face of a prosecutor's objection, the court reinforced that *it* had given the definition "so that is the definition you should apply." Further, as we have indicated, although the court did

overrule the defense objection to the prosecutor's analogies, appellant himself acknowledges that it also authorized the jury to accept defense counsel's view of the standard. This reality he in turn downgrades with reference to cases that say prosecuting attorneys in general are "clothed with the dignity and prestige of their office,"[4] whereas defense attorneys are known as advocates for their clients. It is nothing but speculation that the jurors adopted the prosecutor's views, rejected defense counsel's views which were well articulated and more consistent with the CALCRIM No. 220 instruction on reasonable doubt, and also rejected CALCRIM No. 220 notwithstanding the trial court's admonition to follow its instructions.

Appellant points to the positive responses of two prospective jurors to the prosecutor's misstatements as record evidence strengthening his argument that the misstatements contributed to the verdict. However, neither of the prospective jurors served on the jury. Additionally, the venire knew that defense counsel disagreed with the prosecutor, and a number of jurors indicated their compatibility with defense counsel's position. For example, another prospective juror agreed with defense counsel that he—the prospective juror—did not make everyday decisions by applying the reasonable doubt standard and indicated a willingness to listen to what the judge said about the standard and to think about the evidence in a way that was different from deciding to drive a car. And yet another indicated a willingness to listen to what the judge instructs on reasonable doubt, acknowledging that no one says they can only drive if assured beyond a reasonable doubt that they would not get into an accident. Again, appellant is basing his argument on speculation that could go one way or the other.

We note, too, that appellant seems to suggest that *Chapman* does not permit an examination of the strength of the evidence against a defendant, arguing that this approach "fundamentally misperceives the nature of the federal constitutional prejudice inquiry." Appellant is wrong. The *Chapman* inquiry permits examination of the strength of the People's evidence. (*Neder v. United States* (1999) 527 U.S. 1, 16-17

[4] *People v. Brophy* (1954) 122 Cal.App.2d 638, 652.

[overwhelming evidence of omitted element rendered instructional error harmless under *Chapman*]; *People v. Chun*, *supra*, 45 Cal.4th at pp. 1204-1205 [instructional error harmless beyond reasonable doubt, based on examination of verdicts and evidence].)

B. *Ineffective Assistance of Counsel*

In his summation, defense counsel developed the theory that a left-handed perpetrator—not appellant who was right-handed—killed Jones. "How did Lorie die? I think from what the coroner told you, you can kind of put it together. Not kind of, you can put it together. Somebody came up from behind her, grabbed her by the head, brought a knife from around, started jabbing her. She brought up her hands. She knew what was going to happen. . . . [¶] She puts her hands up and starts trying to make the knife go away, and that is why we start seeing defensive wounds. And the person who is trying to kill her is jabbing at her and jabbing at her, maybe sometimes the knife slips. She tries to grab it with one hand or push it away with another, but finally the person behind her is able to over power her and put the knife right behind the ear and in a classic executioner's move, slit the throat. That is the way this wound happens. . . . [¶] . . . These two wounds on the other side, on the left side of the neck, why do they happen? They happen because as she is struggling with him . . . , the knife slips and makes some shallow wounds here. The defense hand wounds show this is what is happening. She is putting up her hand . . . trying to keep the knife from cutting her throat. . . . [¶] And her defensive arm wound . . . is pointing not toward the palm but away from the palm. What does that mean? . . . Somebody has come up from behind her. . . . [T]he person wielding the knife was wielding it in his left hand, and all of those things I just showed you, that cut right there really tells the story. But also the nicks on this side. If somebody is trying to get her from the right side, there is no way the nicks happened at all. . . . [¶] . . . [¶] Here is the deal, we know Les Miller was right handed. . . . [¶] Now here is the thing, if you are killing somebody, are you going to suddenly use your subdominant hand[?]"

Appellant urges that the left-handed killer theory was contrary to the testimony of the pathologist, Dr. Comfort; the defense was thus based on nonexistent facts, and

therefore he was deprived of effective assistance of counsel. Quoting *United States v. Cronic* (1984) 466 U.S. 648, 659, he maintains that counsel failed utterly to subject the People's case to " 'meaningful adversarial testing.' " In this unusual case, he reasons, prejudice is presumed.

1. *Governing Law*

To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) As to prejudice, we inquire whether there is a reasonable probability that, but for the conduct of counsel, the result would have been different. (*People v. Mincey* (1992) 2 Cal.4th 408, 449.) As well, in reviewing such claims, we must exercise deferential scrutiny; we assess the reasonableness of counsel's conduct under the circumstances as they existed at the time of the maligned acts or omissions. (*Ibid*.)

2. *Analysis*

Dr. Comfort testified that Jones had "classic defensive wounds" on her left hand; perforating small defects on the back of her right hand and large gaping defects on the right palm. Just below the right ear and angling toward the midline of the neck was "the biggest incised wound she had," the potentially lethal wound which severed the common carotid artery. There were several more knife wounds on Jones's neck, including two shallow incised wounds on the left side of the neck. Dr. Comfort had no way to determine the sequence of wounds. And although she could not tell the directionality of the wound that severed the carotid artery, when asked if it was a reasonable interpretation that the person causing the wound might have been standing behind Jones, she replied: "It's one possibility, yes." According to Dr. Comfort, there was "no easy way to say what position either party was in" at the time the perpetrator attacked Jones. Further, she could not tell whether any individual wound was antemortem or postmortem.

Based on this evidence, there was at least a reasonable possibility that one of the attackers stood behind Jones and, as defense counsel argued, the attacker would have held the knife in his left hand because it was easier to sever the carotid artery on the right

side of Jones's neck with that hand, in a classic "executioner's move." Nor would it be unreasonable for counsel to argue that Jones received the hand injuries trying to stop the attack to her neck, and that the two shallow wounds on the left side of the neck occurred when the knife slipped.

There was some evidence to argue a left-handed theory and thus it was not a factually unsupported theory. Dr. Comfort testified it was a possibility that the perpetrator stood behind Jones, and given the nature the wounds, counsel reasonably posited how the wounds could have been inflicted. Defense counsel subjected the prosecution's case to meaningful adversarial testing. He probed prosecution witnesses, including Dr. Comfort, on cross-examination and presented witnesses who supported the defense that appellant was not the co-perpetrator: One witness testified Comarsh was trying to frame appellant; another said Comarsh related that he—Comarsh—and a man named Charles committed the murder; and a third stated that she last saw Jones get into a green "dually" pickup with someone she did not recognize.

People v. Scott (1997) 15 Cal.4th 1188 is instructive. There, the defendant attacked defense counsel as incompetent for presenting a defense that bore no reasonable hope of success. Rejecting the claim, the court explained: "We need not consider the likelihood that this defense would succeed. For present purposes, we may assume defendant is correct that the defense was a forlorn hope. That assumption, however, does not establish that counsel was incompetent for trying it. Many defenses are hopeless, or nearly so. A defense attorney has to make do with the facts presented." (*Id*. at p. 1215.) Such is the case here. Indeed, we are of a mind that had counsel *not* raised the possibility of a left-handed perpetrator, defendant might very well accuse him on appeal of shirking his duty to pursue a defense suggested by the evidence.

III. DISPOSITION

We need not and do not address appellant's cumulative prejudice argument because there was no cumulative error. The judgment of conviction is affirmed.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.

_____
Rivera, J.

APPENDIX A

Defense Counsel Voir Dire of Prospective Juror L.M.

"Q. . . . Let's say that you think, 'Okay. I think Mr. Miller did it, but there are some facts here that Mr. Bruce pointed out that . . . really bothered me. And if those facts are true, and they appear to be true, there's [a] very strong doubt in my mind that he actually did it. But I'm—on the other hand, I'm pretty sure he did it.' [¶] Do you understand that what that means is—what do you think that means? Let's ask that.

"A. I think that if I have a doubt that you can't justify with facts, that you can't move forward in that direction. You've got to make your decision based on everything presented.

"Q. Okay. But you see how it's different than taking a job?

"A. Sure.

"Q. When you take a job, you actually are—usually applying, more likely than not. 'I think it's more likely if I take this job, that I'm gonna be happy than I'm not gonna be.'

"A. Yes.

"Q. But you really don't make that decision beyond a reasonable doubt, 'cause even if you have doubts, you'll still take that job."

Prosecutor Voir Dire of Prospective Juror M.B.

"Q. . . . But as Mr. Bruce used an example with Miss [M.] yesterday about how we apply that standard to important decisions in our life, I think in Miss [M.'s] situation we're talking about a work context. Yes. Doubts about taking [a] job. But you decide to take the job, because you've decided beyond a reasonable doubt that that's the best thing to do.

"A. Right.

"Q. Let me give you another example . . . . [I]it's not an example of the beyond a reasonable doubt standard, but it's an example of how that comes into play in your daily life. [¶] Did you drive here this morning?

"A. I did.

"Q. Okay. You drive, . . . probably on a daily basis—almost daily basis; is that fair?

"A. That's true.

"Q. When you get into your car, whether you think about it or not—and most of us don't—there's gonna be some doubt you're going to make it to where you're gonna go.

"A. Right.

"Q. Okay. Because we read in the paper every day about more horrific car crashes. . . . [B]ut, you know, there's a doubt when you get into your car whether you're gonna make it to your destination alive, because you're in a two-ton hunk of metal rollin' down the road at 55 miles an hour. And you may be the best driver in the world, but there's always some moron out there who's had one too many drinks, or who's talkin on the cell phone and can blow through a red light, and that's it. So there's some doubt you're gonna live to see the end of that trip. [¶] But you get in the car and you drive anyway.

"A. That's right.

"Q. You've decided beyond a reasonable doubt that, 'I'm gonna make it.' And you're here, so that's been the right decision every time you've gotten in the car. [¶] So that's a life and death decision.

"A. Right.

"Q. You've put your life in danger. There's a doubt that you're gonna make it to your destination. But you get in the car and you go there anyway, because you've decided beyond a reasonable doubt that you're gonna get there.

"A. Right.

"Q. Is that fair?

"A. That's fair. And that's an interesting view to put on it. Yeah, it's a great angle to look at it, because it's the same thing with going to bed every night, you know. I'm pretty confident I'm going to wake up tomorrow, but—

"Q. And—you're like me, every once in a while right before ya drop off to sleep, that thought goes dancin' through your mind. But you [go to] sleep anyway. You don't try to stay up.

"A. Right.

"Q. And have to use the same example with airplane flights. That's probably the . . . best example of it. In terms of everybody when they strap themselves in and those engines start on that airplane or on that helicopter, it goes through their mind that, 'I wonder if I'm gonna make it.'

"A. Yes.

"Q. But you do it anyway, 'cause you've made the decision beyond a reasonable doubt that you're gonna make it. Okay? [¶] Does that kind of at least give an example of how the beyond a reasonable doubt standard isn't something foreign or isn't something—

"A. Certainly. . . . And so all of the learning process over the last few days and weeks has been very interesting in that regard."

Prosecutor Voir Dire of Prospective Juror K.B.

"Q. . . . Let me ask, do you think there's a distinction between having to prove something beyond a reasonable doubt and having to prove something beyond all doubt?

"A. Yes.

"Q. Okay. You hesitated a bit. Is there—

"A. I was thinking about driving home on the bluffs.

"Q. I just used that as an example of how the concept comes into play in our daily [lives]. I'm not saying that that's the way you would apply the concept to the facts in this case, but I—I'm just using it.

"A. It's good."

Defense Counsel Voir Dire of Prospective Juror T.K.

"MR. BRUCE: Okay. Mr. Cardoza talked to Mr. [B.] and Miss [M.] . . . . [¶] . . . [¶] . . . About, . . . he stated that, 'Oh, well. We make decisions based on reasonable doubt every day of our life.' [¶] Do you remember hearing that?

"PROSPECTIVE JUROR [T.K.]: Um-hum.

"MR. BRUCE: Q. It's gonna be one of those areas where Mr. Cardoza and I disagree. Okay? [¶] Can I ask you a few questions about that, do you think?

"A. Sure. [¶] . . . [¶]

"Q. So even though you were a careful driver, you were in an auto accident at one time, right?

"A. Um-hum.

"Q. When you got into the car at that point, you didn't know you were gonna get into an accident that day, right?

"A. No.

"Q. When you got into the car that day, did somebody say to you, 'You can only drive if you know beyond a reasonable doubt you're not gonna get into an accident'?

"A. No.

"Q. In fact, did you drive here today?

"A. Yes. . . . [¶] . . . [¶]

"Q. Okay. Well, when you got into the car today, did you say to yourself, 'The only way I'm gonna drive this car, if I'm sure beyond a reasonable doubt I'm not gonna get into an accident'?

"A. No. [¶] . . . [¶]

"Q. So you think it's more likely than not I'm not gonna get into an accident if I'm careful, right?

"A. Yes. [¶] . . . [¶]

"Q. But it's not beyond a reasonable doubt that you're not gonna get into an accident.

"MR. CARDOZA: I'm sorry. I have to object . . . . [T]his is argument . . . .

"COURT: Sustained. [¶] . . . [¶]

"Q. So—and I guess what I'm trying to get at here, I'm trying to ask you, is the judge is gonna tell you what reasonable doubt is. [¶] Are ya willin' to listen to what he says?

"A. Yes.

"Q. It has nothing to do with decisions you make every day of your life.

"MR. CARDOZA: Okay. That's argument.

"THE COURT: Sustained. [¶] . . .

"Q. Mr. Cardoza said that it's similar to decisions you make every day in your life; did you hear—

"A. Um-hum.

"Q. Do you think that's right?

"A. There is a—I mean, it's a scale. And I would think sometimes . . . there would be more weight in that decision than other times.

"Q. Would you drive your car if . . . you had to make a decision like that? If you had to know beyond a reasonable doubt that you were never gonna get in an accident every time you got in your car, would you drive your car at all? [¶] . . . [¶]

"A. Yes."

Colloquy Outside Presence of Venire

"[MR. CARDOZA]: . . . He's gonna have plenty of time to argue about what reasonable doubt is about, but it's not appropriate to do it during jury selection. [¶] That's my objection. [¶] . . . [¶]

"[MR. BRUCE]: . . . And the problem I'm having with [the car example], and I'll make an objection now to it, is that it makes it sound like making a decision beyond a reasonable doubt of something, people do every day. It's a simple decision. You almost don't have to think about it, like you're getting into your car. [¶] I think if he raises that, I'm allowed to question the juror to see if he accepts that, 'cause as in the last juror—

[the] last juror accepted that. I don't want somebody on that jury who's gonna not apply the standard or not apply it in the proper way. [¶] . . . [¶] . . . But the more I'm thinkin' about it, the more I realize that it's an example that minimizes—almost shifts the burden, but it certainly minimizes the beyond a reasonable doubt standard. [¶] And I think that I . . . have a right to ask the jurors questions to make sure they're not minimizing that standard based on the example Mr. Cardoza brought into the court. [¶] . . . [¶]

"MR. CARDOZA: Well, if I may, it's the context of what he said. I clearly explained to them. I'm not saying this—this is the way you approach the reasonable doubt standard, I'm just saying, you know, when you get into your car, you have doubt about whether you're gonna live to see the end of that trip. Same thing when you get into an airplane, you have a doubt. But you decide to make that trip anyway, because you decided beyond a reasonable doubt in that context that you're gonna make the trip safely. Okay? [¶] So my point was, yes, they do apply that—this isn't some magical standard. It's something they apply in that context, and in any context in their daily life. I don't think that's improper. And . . . frankly, I haven't brought it up since. [¶] . . .

"THE COURT: All right. Well, first, maybe I missed it, but I thought that's exactly what you were doing yesterday, Mr. Bruce, when you were asking the juror about her life experiences. I—maybe I didn't catch the nuances, but I thought it was exactly the same example when you were using exactly the same purpose. And I don't find fault with either one of them. [¶] The concept of beyond a reasonable doubt is difficult, but I think the way you're asking the questions about—the example Mr. Cardoza used in his . . . questioning, I guess, frankly, I'm not understanding your point, because I think you did the same thing yesterday with the other juror. Now, whether you did or not, I don't know, because, frankly, I listen, but I'm also not analyzing it the same way. [¶] You want to ask questions about reasonable doubt, that's fine."

Defense Counsel Voir Dire of Prospective Juror C.G., Following Above Colloquy

"Q. Have you ever had to apply the standard of beyond a reasonable doubt consciously before?

"A. I don't think so.

"Q. Okay. So you—are you willing to listen to what the judge says about that standard?

"A. Yes."

APPENDIX B

Excerpts from Closing Arguments

Defense Counsel's Argument to the Jury

"[MR. BRUCE]: We had a discussion during voir dire. It was posited that, well, every time you get in your car you make that decision beyond a reasonable doubt that you are going to get to the other end. Don't you? Somebody said in the jury . . . , 'Gosh, if I had to do that, I would never drive my car.' That is right. If you had to make that decision at that level you never would drive your car. You never would get on an airplane because you don't know what is going to happen out there. You don't have evidence. So the law does not require you to know beyond a reasonable doubt when you get into your car that you are going to make it to the other end.

"Let's face it, some people don't make it. Does that mean they made the wrong decision? The law does not require you to know beyond a reasonable doubt anything in your daily life, anything. The only time in your life you are going to be asked to decide something beyond a reasonable doubt, the only time in your life, is right here in the courtroom in a criminal case, period.

"Somebody wants to take your kid away because they think you are not a good parent, guess what, the State does not have to prove that beyond a reasonable doubt. Somebody wants to sue you for a million dollars, throw you and your family out on the street, they have an even lower standard, not beyond a reasonable doubt. But in a criminal case is the only time the law asks you to decide beyond a reasonable doubt. The only time. Please don't lower the standard just because you think it is as easy as getting into your car and driving.

"What is reasonable doubt? Well, . . . I like to usually tell jurors it is anything that bothers you about the case that bothers you to the point that you are not sure what happened.

"You know, beyond a reasonable doubt basically says that when you decide you are going to vote guilty it is because there is nothing in [the] case that bothers you.

"MR. CARDOZA: Well, that is a complete misstatement of the law and complete misstatement of the instruction.

"THE COURT: Ladies and gentlemen, I have given you the definition of reasonable doubt so that is the definition you should apply.

"MR. BRUCE: What I was going to say is as long as it is reasonable and significant.

"Now, if it bothers you that one person says the truck was white and one person says the truck was green, that is not significant. That is not reasonable doubt. [¶] If it bothers you that [the] truck is even brought up and she drives [away] in that truck and is never seen again, and that is something that is significant to you, that gives you a reasonable doubt.

"If it is significant to you that the evidence on Lorie's neck shows you that it is reasonable to say that a left-handed person did that, and Les is not left handed, that is a reasonable doubt.

"If the fact that there is no physical evidence here that ties Les to the crime bothers you, that is a reasonable doubt.

"If the credibility of the confession bothers you—the whole People's case rests on these two statements. If you can't believe the statements to the point that you have no doubt left that is reasonable about the validity of that statement, if you have some reasonable doubts about whether the statements are true, guess what, that is a reasonable doubt even if you think it is likely he did it because some people would.

"But if you question some of the statements in that confession, particularly the crucial one that Les is supposedly the one that stabbed her, that is a reasonable doubt. [¶] . . . [¶] . . . Why do we have this really high standard? . . . [W]e have [this] strange standard of—has to be proven beyond a reasonable doubt because I think our societal experience for hundreds of years has been if we have seen a criminal case and there is something about that case that just ain't right, and it is something significant in that case, it is usually a sign there is something else going on here other than what we are being told. . . . [¶] . . . Every day you hear people exonerated 20 years later because the DNA

came up. . . . There was evidence that indicated the person was innocent, but it was ignored. I am asking you, please, don't ignore the evidence that Les is innocent even if you are not totally convinced he is innocent. That is not what the law says. It says you have to be convinced beyond a reasonable doubt that he is guilty. [¶] . . . The jury instruction says it is not beyond all possible doubt. Everything in human affairs is subject to some possible or imaginary doubt. That is true. That is what the jury instruction says. Let me tell you the difference between possible and reasonable. Possibly could I have killed Lorie? Hey, there is no evidence I didn't. Nobody knows where I was that night. Could be I am defending Les because I want to see him convicted so I get away with it. Is that possible? Yeah, it is possible. It is absolutely possible. Is it reasonable? No, it is not reasonable."

Prosecutor's Rebuttal

"[MR. CARDOZA]: With due respect to counsel, I have to disagree, the reason we talk about what reasonable doubt is . . . it is kind of a wispy concept to try to grasp. It is no surprise, and it is what they need to do. Defense counsel . . . today gets up here and tries to convince you it is some sort of Olympian feat to deal with this incredibly high standard, and it should be a high standard, but it is not an impossible standard. I disagree with counsel. It is a standard you use in your daily lives. You make life and death decisions whether you think about it in these terms or not.

"MR. BRUCE: I object. It misstates the standard.

"THE COURT: Counsel—both counsel have used analogies from life to try to assist the jurors in understanding reasonable doubt, and I don't see anything different in what Mr. Cardoza is doing than what you did, so I will over[rule] the objection.

"MR. CARDOZA: Whether you think about it or not—after voir dire you probably all thought about it. When you get in your car every day, if you thought about it—

"MR. BRUCE: May I have a continuing objection at this time?

"THE COURT: Yes.

"MR. BRUCE: Thank you.

"MR. CARDOZA: You know, there is a doubt you are going to get . . . where you are headed alive. You know that. You know people get killed in cars every day, but you make the decision to drive. You are making a decision beyond a reasonable doubt. You are making a decision about your life. You are not making a decision about your life in this case. You are making a decision about what happens because of the end of Lorie's life, and you are making a decision about the defendant's life. You are not making a decision about your life.

"How is that any greater burden than the decision you make when you get in a car and drive or particularly when you get on an airplane and you have to go somewhere. I guarantee you, you get in a plane or a helicopter, you strap yourself in, the prospect of crashing does dance through your mind. If it didn't, I would be concerned. It is there somewhere, but you go ahead and knowing that if that plane crashes the chances of your surviving are nil. You go ahead and make that decision to take the plane flight anyway. How is that any less of a—just think about that. Are we asking you to do something you don't do every day? Are we asking you to apply a standard that is higher than what you make in your life and death decisions every day? No. The law is what it is. You will see the instruction. See what it means to you. The only reason I use the analogy is this is not Sisyphus pushing the bolder up the hill, and just before you get to the top it rolls back down. That is not what reasonable doubt is. Reasonable doubt is when you compare and consider all of the evidence, and you make your decision based on that comparison and consideration. If you have a reasonable doubt, you find him not guilty. But if you don't have a reasonable doubt, convict him. That is your duty and that is your responsibility."